

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 99-0350
Retail Sales Tax, Withholding Tax
For The Tax Periods: 1995 through 1997**

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ISSUE

I. Retail Sales Tax, Withholding Tax– Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8, IC 6-8.1-5-1, IC 6-2.5-2-2, *Department of Revenue v. Safayan*, 654 N.E.2d 270, 273 (Ind. 1995), 11 U.S.C. §507(a)(7).

The Taxpayer disputes the determination that he had a duty to remit the corporation's sales tax and withholding tax.

II. Retail Sales Tax, Withholding Tax– Returned Check

Authority: IC 6-8.1-8-1, IC 6-2.5-9-3, IC 6-8.1-10-5.

The Taxpayer disputes the 100% penalty for a returned check.

STATEMENT OF FACTS

Taxpayer was assessed for retail sales and withholding taxes as a responsible officer. Taxpayer was listed as the President of the corporation at the Secretary of State's Office. The Department's records indicate the corporation closed in 1998. Taxpayer subsequently petitioned for Bankruptcy under Chapter 7. More facts will be provided as necessary.

I. Retail Sales Tax, Withholding Tax – Responsible Officer

DISCUSSION

A gross retail (sales) tax is imposed on retail transactions made in Indiana. IC 6-2.5-2-1. While this sales tax is levied on the purchaser of retail goods, it is the retail merchant who must "collect the tax as agent for the state." IC 6-2.5-2-2. Individuals may be held personally responsible for failing to remit any sales tax. Pursuant to IC 6-2.5-9-3:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

- (2) has a duty to remit state gross retail or use taxes to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

In addition, withholding taxes were assessed against the Taxpayer pursuant to IC 6-3-4-8(f), which provides that “[i]n the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest.”

IC 6-8.1-5-1 specifically provides that notice of a proposed assessment is *prima facie* evidence that the Department’s claim for the unpaid tax is valid. It is the burden of the taxpayer to prove that the proposed assessment is wrong.

Taxpayer concedes he was President of the corporation, but states that he is not responsible for the tax liabilities. Taxpayer provided the Department with copies of letters and invoices sent to the Secretary of the company and argues that the Secretary is solely responsible. The documents sent contain notes allegedly made by the Secretary and purport to demonstrate that he handled the bills. Taxpayer stated that the Secretary embezzled from the company although no evidence of criminal or civil action against the Secretary was provided. Taxpayer also provided a copy of a Master Demand Business Loan Note for the corporation signed by the Secretary. However, the note also requires Taxpayer to provide an annual personal financial statement.

Pursuant to *Indiana Department of Revenue v. Safayan*, 654 N.E.2d 270, 273 (Ind. 1995): “The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid”. Also, the court stated, “where the individual was a high ranking officer, we presume that he or she had sufficient control over the company’s finances to give rise to a duty to remit the trust taxes.” *Id.* Here, the Taxpayer held the title of president.

From these facts, the Department must conclude that Taxpayer was properly named a responsible officer. As President, Taxpayer had control and authority over the company’s finances to ensure that the trust taxes were paid. Therefore, pursuant to IC 6-2.5-9-3 and IC 6-3-4-8, Taxpayer had a duty to remit the sales and withholding taxes to the State of Indiana.

Taxpayer also provided a copy of Taxpayer’s Chapter 7 Bankruptcy. However, the Department has an unsecured priority claim pursuant to 11 U.S.C. §507(a)(7), thus, this does not relieve Taxpayer of his obligation to the State of Indiana.

FINDING

The Taxpayer’s protest is denied.

II. Retail Sales Tax, Withholding Tax – Returned Check

Taxpayer protests the assessment for a returned check dated May 7, 1998 made by the corporation. Taxpayer sent in a money order postmarked October 4, 1998 and did not include the 100% penalty. Taxpayer was assessed as a responsible officer for the difference. The liability was paid in March 2000.

Pursuant to IC 6-8.1-8-1, if a person pays a tax liability by check, bank draft, cashier's check, or money order, "the liability is not discharged and the person has not paid the tax until the draft, check, or money order has been honored by the institution on which it is drawn." An individual who is considered a responsible officer is liable to remit sales tax. IC 6-2.5-9-3.

Also, IC 6-8.1-10-5 states:

- (a) If a person makes a tax payment with a check and the department is unable to obtain payment on the check for its full face amount when the check is presented for payment through normal banking channels, a penalty of ten percent (10%) of the unpaid tax or the face value of the check, whichever is smaller, is imposed.
- (b) When a penalty is imposed under subsection (a), the department shall notify the person by mail that the check was not honored and that the person has ten (10) days after the date the notice is mailed to pay the tax and the penalty either in cash, by certified check, or other guaranteed payment. If the person fails to make the payment with the ten (10) day period, the penalty is increased to one hundred percent (100%) multiplied by the face value of the check or the unpaid tax, whichever is smaller....

Taxpayer missed the 10 day deadline to pay the liability before the liability increased to include the 100% penalty. Thus, when Taxpayer sent in the money order for the original assessment, there remained an outstanding balance created by the addition of the penalty. Consequently, the assessment was valid.

FINDING

The Taxpayer's protest is denied.